

**Objection to the Issuance of Confined Feeding Operation
Approval, Farm ID #6980 / Animal Waste #AW-6812
Natural Prairie Farmland Holdings LLC
2020 OEA 1 (19-W-J-5045)**

OFFICIAL SHORT CITATION NAME: When referring to 2020 OEA 1, cite this case as *Natural Prairie, 2020 OEA 1*

Topics:

Summary judgment
Confined feeding operation
CFO
Ground water monitoring plan
GWMP
Approval
327 IAC 19-10-1
Active life
statistically significant increase
CFO Guidance Manual
Statutory construction

Presiding Environmental Law Judge: Catherine Gibbs

Party representatives:

Counsel for IDEM:	Susanna Bingman
Petitioner:	Kim Ferraro
Permittee:	Daniel McNerny, Bradley Sugarman (Bose McKinney & Evans)

Order issued: June 11, 2020

Index category: Water

Further case activity: None

STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

Findings of Fact

- 2020 OEA 2

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Debra Cutts, Steven Crowley, Kim Starkey and Pat Starkey (the Petitioners) filed a Petition for Administrative Review and Stay of Effectiveness.

4. Petitioners allege the following defects in the Approval:
 - a. The Approval allows a continuing violation of Section 404 of the Clean Water Act.
 - b. The Approval allows unlawful filling and conversion of wetlands in violation of Section 404 of the Clean Water Act and the “Swampbuster Provisions” of the Food Security Act.
 - c. IDEM unlawfully approved the Janicki System.
 - d. The Approval violates ground water monitoring requirements.
 - e. The Approval violates land application requirements.
 - f. The Approval allows a substantial endangerment to human health and the environment.
5. On July 1, 2019, Protect Our Kankakee River Basin, Roy Barnes and Pat Starkey were voluntarily dismissed from this cause.
6. A hearing on the motion for a stay of effectiveness was held on March 15, 2019. At the close of Petitioners’ case, Permittee moved to dismiss the request for a stay pursuant to Ind. Trial Rule 41(B). The ELJ preliminarily granted this motion on March 19, 2019. On March 28, 2019, the ELJ issued Findings of Fact, Conclusions of Law and Order Denying Stay (Stay Order).
7. The ELJ issued findings of fact, conclusions of law and order on the motions for summary judgment on January 28, 2020, which are incorporated herein.
8. The ELJ granted summary judgment on the following issues:
 - a. Petitioners are aggrieved or adversely affected.
 - b. Summary judgment was entered in Permittee’s favor regarding Petitioners’ allegations on the setback requirements, the Janicki System, the land application requirements, and harm to human health and the environment. (Issues specified in Finding of Fact 4 a, b, c, e, and f).
9. The ELJ denied summary judgment on the issue of whether the ground water monitoring requirements in the Approval are adequate (Issue specified in Finding of Fact 4 d above).
10. This matter was set for final hearing on the groundwater contentions on June 3, 2020. The parties jointly moved to have the ELJ make a final decision based on the evidence submitted in support of summary judgment. Mr. Risch’s opinion was withdrawn from consideration.
11. Permittee proposed and IDEM approved the following provisions of the ground water

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monitoring plan for the CFO.²

- a. At least one (1) ground water sampling event must occur before any manure is deposited into the waste lagoon. Section 2.2, Wells and Piezometers, page SJA 000259.
- b. Within 90 days of construction completion, piezometers must be installed. Section 2.0, Wells and Piezometers, page SJA 000258.
- c. Piezometers will be monitored monthly for one (1) year to determine ground water flow direction. Section 3.0, Water Elevation Study, page SJA 000260.
- d. The Water Elevation Study will be used to determine the locations of the monitoring wells, consisting of at least one background well location, one source well location and 3 sentinel well locations. Section 1.0, Introduction, page SJA 000257, Section 3.0, Water Elevation Study, page SJA 000260 and Section 4.0, Monitoring Well Locations, page SJA 000261.
- e. The locations of the monitoring wells must be approved by IDEM Geology Staff prior to installation.³
- f. Monitoring parameters include (i) field pH; (ii) field specific conductance; (iii) nitrates; (iv) chloride; (v) fecal coliform bacteria; (vi) sulfate; and (vii) total dissolved solids. Section 5.0, Ground Water Monitoring Parameters, page SJA 000262.
- g. Upon installation of the permanent wells, Permittee will conduct an initial monitoring period of no less than eight (8) sampling events to establish normal site conditions. Section 1.0, Introduction, page SJA 000257 and Section 5.0, Ground Water Monitoring Parameters, page SJA 000262
- h. After the initial monitoring period, Permittee may request that the frequency of monitoring be reduced. Section 1.0, Introduction, page SJA 000257 and Section 5.0, Ground Water Monitoring Parameters, page SJA 000262
- i. Permittee shall comply with the Sampling and Analysis Plan. Section 6.0, Sampling and Analysis Plan, page SJA 000263.
- j. Permittee must prepare a report of ground water monitoring results within sixty (60) days after each sampling event and shall report results of sentinel and background sampling to IDEM. Section 1.0, Introduction, page SJA 000257 and Section 7, page SJA 000267.
- k. In addition to other requirements, “An evaluation of the data collected from the ground water monitoring system will be performed, beginning after the eighth quarterly monitoring event. The data collected during monitoring events will be evaluated to identify statistically significant increases in monitored parameters to determine if concentrations exceed background levels.” Section 8.0, Data Evaluation, page SJA 000269.

² All references, including sections and page numbers, are to Natural Prairie’s Motion for Summary Judgment, Volume 1, Exhibit 1, Confined Feeding Operation Approval with Construction, Natural Prairie Indiana Farmland Holdings, LLC, Farm ID #6980, Animal Waste Number AW-6812, Final Approved January 10, 2019.

³ Affidavit of Leo Kurylo, LPG, Natural Prairie’s Motion for Summary Judgment, Volume 1, Exhibit 3, paragraph 21.

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1. If sample results from Sentinel locations show statistically increasing trends, IDEM may require corrective action and additional monitoring locations (Compliance locations). Section 1.0, Introduction, page SJA 000257.
12. In addition, the Approval contains Special Approval Conditions specific to ground water monitoring. The condition states:

The permittee shall comply with the current ground water monitoring program detailed in the attached ground water monitoring plan, received by IDEM on December 10, 2018, for the dairy production area. All groundwater monitoring wells will be sampled each quarter of each year. All results and reports will be submitted to IDE within sixty (60) days of sampling and are required to be kept in your operating record on-site. This plan does not include land application area.

If for any reason a ground water monitoring well is destroyed or otherwise fails to properly function, the permittee shall notify the Commissioner within ten (10) days of discovery. The well must be repaired if possible. If the well cannot be repaired, it must be properly closed and replaced within sixty (60) days of the notification unless the permittee is notified otherwise in writing by the Commissioner.

Conclusions of Law

1. IDEM is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per Ind. Code § 13-13, *et seq.* The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to I.C. § 4-21.5-7-3.
2. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
3. This office must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency’s initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). “*De novo* review” means that, “all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.” *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).
4. IDEM can require ground water monitoring at a CFO under 327 IAC 19-10-1. The rule sets out the reasons why IDEM can require ground water monitoring and the minimum

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standards for any such plan. IDEM required Permittee to submit a ground water monitoring plan (GWMP). The Permittee's GWMP was approved after three (3) revisions in response to IDEM's comments. Petitioners allege that the GWMP approved by IDEM does not meet the minimum standards set out in the rule.

5. If a GWMP is required, then, pursuant to 327 IAC 19-10-1 (in pertinent part), the plan must comply with the following requirements:

(c) All CFOs required to conduct ground water monitoring must comply with the requirements of this section.

(d) Owners/operators of a manure storage facility shall develop and follow a written ground water monitoring plan. This plan must:

- (1) be approved by the department;
- (2) be kept in the operating record; and
- (3) include:

(A) at least the following monitoring parameters:

- (i) field pH;
- (ii) field specific conductance;
- (iii) nitrates;
- (iv) chloride;
- (v) fecal coliform bacteria;
- (vi) sulfate; and
- (vii) total dissolved solids;

(B) monitoring frequency;

...and

(G) a description of how the owner/operator shall determine whether there is a statistically significant increase over background values for each parameter monitored, with the exception of field pH and field specific conductance. The owner/operator shall make these statistical determinations each time the owner/operator collects samples.

(e) If the owner/operator determines under subsection (d)(3)(G) that there is a statistically significant increase for parameters at any monitoring device, the owner/operator shall notify the commissioner of this finding in writing within fourteen (14) days. The notification must indicate what parameters have shown statistically significant increases over background levels. The department may then require corrective action.

(f) Owners/operators must submit the results of ground water monitoring to the department within sixty (60) days of sampling.

(g) Required monitoring must be conducted throughout the active life of the storage facility. Ground water monitoring may be extended beyond the active life of the manure storage facility if a corrective action program is being conducted at the facility

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6. Petitioners assert that the Permittee is not required to determine a statistically significant increase for the first 3 years of operation as none of the required sampling conducted during this time mandates such an analysis. Petitioners allege that, during these 3 years, the CFO could contaminate the underlying aquifer and result in an “artificial, ‘contaminated baseline’ for comparison.”⁴ Petitioners cited to Mr. Risch’s expert opinion in support of this contention⁵, but have now withdrawn Mr. Risch’s opinion from consideration.
7. Further, Petitioners allege that the plan does not require monitoring throughout the *active life* of the CFO. This argument is based on the fact that Permittee is not required to determine whether there is a statistically significant increase over background values until three years after the CFO begins operations, including the use of the waste lagoon.
8. In reference to the requirement to determine statistically significant increases, IDEM’s guidance manual for CFOs, states,

The CFO rules require a statistical evaluation each time the owner/operator collects samples. In practice, the initial statistical evaluation using the procedure in this guidance will not occur until the ninth sampling event because the first 8 sampling events are used to establish the statistical background limit. However, if the sampling results during the first 8 quarters of monitoring show a markedly increasing trend indicating a problem with the waste management system, the statistical evaluation procedures described in this guidance may not be appropriate, and IDEM may require alternative procedures or corrective action.⁶

9. As pointed out by Petitioners, the CFO will have been in operation for 3 years prior to Permittee being required to determine a statistically significant increase, allegedly in violation of the rule. However, it is clear that IDEM anticipated this and addressed this issue in the CFO Guidance Manual. This Manual was published in 2014 and has been used consistently since that time. The Manual expressly addresses the issue and states that an increase in the first 8 quarters could trigger corrective action. The question then is how much weight should be given to the Manual.
10. “In statutory construction, our primary goal is to ascertain and give effect to the intent of the legislature.” *Gray v. D & G, Inc.*, 938 N.E.2d 256, 259 (Ind. Ct. App. 2010).
11. “Further, if a court determines that the statute or rule is ambiguous, it may look to the agency’s interpretation for evidence of the legislative intent. The Indiana Supreme Court,

⁴ Petitioners’ Motion for Partial Summary Judgment, pg. 17.

⁵ Petitioners’ Motion for Partial Summary Judgment, Exhibit 22, pg. 4

⁶ Natural Prairie’s Motion for Summary Judgment, Volume 2, Exhibit 12, IDEM’s Guidance Manual for Indiana’s Confined Feeding Program, page 85.

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in *Shell Oil v. Meyer*, 705 N.E.2d 962, 976 (Ind. 1998) held, “However, administrative interpretation may provide a guide to legislative intent. ‘A long adhered to administrative interpretation dating from the legislative enactment, with no subsequent change having been made in the statute involved, raises a presumption of legislative acquiescence which is strongly persuasive upon the courts.’ *Board of Sch. Trustees v. Marion Teachers Ass’n*, 530 N.E.2d 309, 311 (Ind. Ct. App. 1988); accord *Baker v. Compton*, 247 Ind. 39, 42, 211 N.E.2d 162, 164 (1965).” In this instance, IDEM’s interpretation is embodied in the Guidance Manual. IDEM’s actions in this case are consistent with that interpretation.

12. Permittee and IDEM contend that the GWMP meets the rule requirements in accordance with the Guidance. Permittee must conduct at least one sampling event prior to any waste being deposited into the lagoon to document pre-operational ground water quality. A water table study must be conducted to determine where to place the ground water monitoring wells. Monitoring wells, once installed, must be sampled once a quarter. This plan complies with the Guidance Manual. The Guidance Manual is accorded great weight as a long adhered to administrative enactment. The Petitioners have failed to prove that the GWMP does not comply with the applicable regulations.
13. Petitioners rely on Mr. Risch’s opinion to support their contention that, due to the deficiencies in the GWMP, an artificial background level may be created Without Mr. Risch’s opinion, Petitioners have no evidence that the GWMP, as approved, will do this.
14. Petitioners have failed to meet their burden of proof on this issue and entry of a final order in favor of IDEM and Permittee is appropriate.

Final Order

For all of the foregoing reasons, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** judgment is entered in IDEM’s and Permittee’s favor on the remaining issue regarding ground water monitoring.

You are hereby further notified that pursuant to provisions of Indiana Code § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order, subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 11th day of June, 2020 Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge